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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-842

LARRY DONALD BAILEY, *Petitioner*

v.

STATE OF NORTH CAROLINA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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STATE OF NORTH CAROLINA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

The Petitioner, Larry Donald Bailey, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of North Carolina, entered in the above entitled case on September 10, 1973.

OPINION BELOW

The Opinion of the Court of Appeals of North Carolina is recorded at 18 N. C. App. 313. The decision of the Supreme Court of North Carolina denying Petition for Writ of Certiorari and decision dismissing Appeal are recorded at 283 N. C. 754.

JURISDICTION

The Judgment of the Court of Appeals was certified on June 4, 1973, and a copy thereof is appended to this Petition as Exhibit 1. The decision of the Supreme Court of North Carolina was certified on September 10, 1973, denying Petition for Certiorari and dismissing the Appeal, and a copy thereof is appended to this Petition as Exhibit 2. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Did the Trial Court deprive the defendant of due process of law by ordering counsel for the defendant to retire or absent themselves from the presence and hearing of the Court, at a time when the defendant's case had been called for trial and during which time Official Court Proceedings in the defendant's case were being considered by the Court in the presence of the Solicitor for the State of North Carolina and the Official Court Reporter, said defense counsel being present until they were ordered by the Court to absent themselves from the Court during the Court proceedings and deliberations in the defendant's case, while Court was in session, and did the Court in like manner deprive the defendant of due process of law by not having the defendant present while said proceedings were being conducted by the Court, said proceedings being part and parcel of his trial on the merits?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V, CONSTITUTION OF THE UNITED STATES

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia,

when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioner was charged in a bill of indictment with felonious house breaking and felonious larceny. He pleaded not guilty. From a verdict of guilty on each charge, the Trial Judge rendered Judgment that the defendant be imprisoned for a term of ten years on each charge, said terms to run consecutively, thus adjudging that the defendant serve a term of twenty years in the North Carolina State Prison.

The facts material to the consideration of the question or questions presented are as follows: The case was called for trial at the July 17, 1972 Regular Session of the Superior Court of Hertford County, North Carolina. On June 30, 1972 the defendant filed a Motion for a Bill of Particulars pursuant to North Carolina procedure. (R. pp. 10-23) The defendant considered

the matters called for in the Motion for Bill of Particulars to be essential to his proper defense. The State of North Carolina, through its prosecuting officer, ignored defendant's Motion and refused to produce the indicated information and filed no response or objections thereto.

During the course of the trial on July 18, 1972 the defendant's Motion for Bill of Particulars was heard by the Trial Judge and denied. (R. pp. 62-66) In view of the Court's denial the defendant immediately moved the Court to continue the case to allow time for defendant to properly prepare his defense, which Motion was denied by the Court. (R. pp. 73-75) Thereupon, the Trial Court, without adjournment or recess of Court, directed and ordered the defendant's counsel to retire from the presence and hearing of the Court and allowed the Solicitor for the State of North Carolina and the Official Court Reporter to remain with the Court while the Court conducted further proceedings and deliberations incident to the defendant's said Motions which were being heard during the said trial. During the further proceedings incident to said Motions heard during the trial, the trial court indicated in a memorandum for the appellate court that the Court received certain information and data from the Solicitor for the State, all of such proceedings, deliberations and receipt of information and data from the Solicitor being carried on while the defendant's counsel had been required to leave under order of the Court and while the defendant himself was not in the presence and hearing of the Court. (R. pp. 75, 203 & 204).

The defendant duly raised the constitutional questions emanating from his contention that he was tried, in part, in absentia by setting forth the matter under

his Exceptive Assignment No. 3, R. pp. 185-186, as saved by his Exception No. 5(b), R. p. 75, as follows:

> "The action of the Court, in Ordering counsel for the defendant to retire, or absent themselves from the presence and hearing of the Court, at a time when the Official Court Reporter and the Solicitor for the State of North Carolina, were allowed to remain and be present before the Court during the official Court proceedings in this case, after Defendant's previous Motion for a Bill of Particulars and Motion for a continuance were summarily OVERRULED without the taking, hearing or transcription of any statements, testimony, evidence or argument by the State in opposition thereto, and that the Order of the Court and the Findings of Fact incorporated therein, were found by the Court in counsel for the defendant's absence and dictated in the aforesaid Order during the forced absence of the defendant and his counsel, and that while the Record not only clearly shows the defendant's written motion for a Bill of Particulars, but also three supporting, verified affidavits, a brief and memorandum of law in support thereof, and all of the additional assigned reason made in defendant's Oral Motion for a Bill of Particulars were made before the Court and are a part of the Record, and the defendant's motion for a continuance made before the Court, and are of Record; and further that the said Record contains no reply; reasons, objection or opposition by the State of North Carolina to the defendant's Motion for Continuance, upon which the Court could base any 'findings of fact' in support of said Order.
>
> That not only are the purported 'Findings of Fact' upon which Order is based are arbitrary but they are totally lacking of foundation.
>
> Additionally, the defendant through counsel, or in proper person has the Constitutional right to be present, in Court, at all stages of his trial."

REASONS FOR GRANTING THE WRIT

A defendant in a criminal prosecution has the constitutional right to be present throughout every stage of the trial, which right may be waived only in prosecutions for less than capital offenses. At no time did the defendant or his counsel waive the right to be present at any stage of his trial.

In every criminal prosecution it is the right of the accused to be present throughout the trial, unless he waives the right. *State* v. *Pope,* 257 N. C. 326. The due process clause of the Fifth Amendment made applicable to the States by the Fourteenth Amendment requires that defendant be allowed to be present with his counsel at every stage of the trial.

Illinois v. *Allen,* 397 U.S. 337;
Lewis v. *U. S.,* 146 U.S. 370;
Hopt v. *Utah,* 110 U.S. 574;
Miranda v. *Arizona,* 384 U.S. 436;
Powell v. *Alabama,* 287 U.S. 45;
Gideon v. *Wainwright,* 372 U.S. 335;
Pollard v. *U. S.,* 352 U.S. 354;
United States v. *Wade,* 388 U.S. 218.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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APPENDIX

APPENDIX

Exhibit 1

No. 736SC114 — Sixth District

North Carolina Court of Appeals

Spring Session 1973

From Hertford

State of North Carolina

v.

Larry Donald Bailey

Appeal by defendant from Cowper, Judge, 17 July 1972 Regular Session of Hertford County Superior Court.

Defendant was tried on a three-count bill of indictment charging him with breaking and entering, larceny and receiving. He was convicted of breaking and entering and larceny, and sentenced to a term of imprisonment of ten years on each charge to run consecutively.

The State's evidence tended to show that defendant was employed by David Earl Brinkley as a carpenter, and that on 9 September 1971 Brinkley's home was broken into and a valuable gun and coin collection taken. Brinkley valued the collections at eight to ten thousand dollars. Additionally, a steel safe weighing about 350 to 500 pounds was taken from the home. The safe contained some of the coins in Brinkley's collection. Defendant was also a coin collector and had seen Brinkley's collection.

Lloyd Fletcher Crawford testified to having participated in the crime and explained in detail the manner of its performance and the opening of the safe. He testified he was paid $1,000 by defendant as a share of the spoils. Crawford's testimony not only implicated the defendant, but established him as the originator and guiding force behind the larceny plan.

Crawford testified that he and defendant took the safe to a cottage at Kitty Hawk, North Carolina, some few days after the theft, and that there they cut a hole in the same using an electric grinder. Afterwards the safe was thrown from a bridge into Currituck Sound but was never found.

Mr. William E. Pierce, a forensic chemist with the State Bureau of Investigation, testified that he examined vacuum sweepings of the cottage in which Crawford said that he and defendants opened the safe. Pierce found the dust to contain particles of melted steel pellets and a small amount of corundum dust. The steel pellets, in his opinion, had been melted from a high-temperature grinding operation. Corundum, he explained, "is a very hard mineral used in grinding and cutting operations."

Attorney General Robert Morgan by Associate Attorney George W. Boylan for the State.

Jones, Jones & Jones by L. Herbin, Jr. for defendant appellant.

CAMPBELL, Judge.

Counsel is reminded that the rules of practice in this Court are not merely advisory, but are mandatory. Attention is direction to Rule 27½ of the Rules of Practice, which provides in part:

> "The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. . . .
>
> The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal."

Appellant's record contains 84 exceptions, grouped into 42 assignments of error. These exceptions and assignments of error were brought forward in appellant's brief in 45 questions, the statement of which requires 14 pages of the 156-page brief.

"It would much facilitate the argument and decision of causes if counsel would always thus carefully go over the exceptions, taken out of abundant caution during the trial, and eliminate all except those which on reflection are deemed vital, and thus concentrate their argument and our attention on pivotal points of the case." Britt v. R.R., 148 N.C. 37, 61 S.E. 601 (1908).

No stolen merchandise was ever found in the defendant's possession, and there was no physical evidence linking the defendant to the commission of the crime. However, regardless of whether Crawford's confession testimony was corroborated, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant. State v. Tilley, 239 N.C. 245, 79 S.E. 2d 473 (1954).

We find no error in the conduct of the trial and the defendant's conviction and judgment is

Affirmed.

Judges Britt and Morris concur.

A True Copy
Theodore C. Brown, Jr.
Clerk of the Court of
Appeals of North Carolina

By /s/ Carl Jackson
Deputy Clerk

June 4, 1973

Exhibit 2

STATE OF NORTH CAROLINA
HERTFORD COUNTY

OFFICE OF THE CLERK OF THE SUPERIOR COURT

I, Sheila B. Banks, Deputy Clerk of the Superior Court of Hertford County, State of North Carolina, said Court being a Court of Record, having an official seal, which is hereto affixed, do hereby certify the foregoing and attached (3 sheets) to be a true copy of Certification from Theodore C. Brown Jr., Clerk of the Court of Appeals denying Petition for Certiorari and Certification from Theodore C. Brown Jr., Clerk of the Court of Appeals Dismissing the Appeal, filed by the Petitioner Larry Donald Bailey as the same is taken from and compared with the original now on file in this office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the Superior Court of Hertford County, at my office in Winton, North Carolina, this 21st day of November, 1973.

/s/ SHEILA B. BANKS
Deputy Clerk Superior Court
Ex Officio Judge of Probate

(SEAL)

NORTH CAROLINA COURT OF APPEALS

From the Office of
Theodore C. Brown, Jr., Clerk
Box 2779—Telephone 829-3561
Raleigh, North Carolina 27602

To Mr. Arthur W. Greene, Clerk
Hertford Superior Court

September 10, 1973

STATE OF NORTH CAROLINA

v.

LARRY DONALD BAILEY

No. 736SC114

Sirs:

Please find enclosed herewith:

☐ Opinion

☐ Judgment

☒ 2 Certificates

☐ .....

Please file same in your records.

THEODORE C. BROWN, JR.
Court of Appeals Clerk
P. O. Box 2779
Raleigh, North, Carolina

COA-28

[Filed Sept. 11, 1973 at 9:30 o'clock A.M.
A. W. GREENE, *SBB*, Clerk of Superior Court]

No. 736SC114

SIXTH DISTRICT

HERTFORD COUNTY

File #72-CR-1057
File #73-2-1432

NORTH CAROLINA COURT OF APPEALS

SESSION

STATE OF NORTH CAROLINA

v.

LARRY DONALD BAILEY

Certification to Superior Court

Petition for Certiorari to review the decision of the Court of Appeals May 23, 1973 was denied by order of the Supreme Court of North Carolina in Conference on the 31st day of August, 1973 and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Hertford Superior Court that the Supreme Court of North Carolina has denied the Petition for Certiorari filed by petitioner in this cause.

Witness my hand and official seal this the 10th day of September, 1973.

/s/ THEODORE C. BROWN, JR.
Theodore C. Brown, Jr.
Clerk of the Court of Appeals

(SEAL)

No. 736SC114

SIXTH DISTRICT

HERTFORD COUNTY

File #72-CR-1057

File #73-2-1433

NORTH CAROLINA COURT OF APPEALS

SESSION

STATE OF NORTH CAROLINA

v.

LARRY DONALD BAILEY

Certification to Superior Court

Appeal to review the decision of the Court of Appeals May 23, 1973 was dismissed by order of the Supreme Court of North Carolina in Conference on the 31st day of August, 1973 and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Hertford Superior Court that the Supreme Court of North Carolina has dismissed the Appeal in this cause, for the lack of substantial Constitutional question.

Witness my hand and official seal this the 10th day of September, 1973.

/s/ THEODORE C. BROWN, JR.
Theodore C. Brown, Jr.
Clerk of the Court of Appeals

(SEAL)